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IN THE

IN THE SUPREME COURT OF THE UNITED STATES

October 1990 Term

REHAB AMER and AHMED AMER,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Writ of Certiorari To
the Court of Appeals of the State of Michigan

RESPONDENT CHILDREN'S BRIEF IN OPPOSITION

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
WITHOUT AFFIDAVIT IN SUPPORT

CERTIFICATE OF FILING

PROOF OF SERVICE

WILLIAM E. LADD (P-30671)
Counsel for Amer Minors
JUVENILE DEFENDER OFFICE
2400 Penobscot Building
Detroit, Michigan 48226
(313) 964-0690

THOMAS M. HARP (P-24603)
JUVENILE DEFENDER OFFICE
2400 Penobscot Building
Detroit, Michigan 48226
(313) 964-0690

CHILDREN'S QUESTIONS PRESENTED

1. WHETHER PETITIONERS' DUE PROCESS RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT, WERE VIOLATED WHERE THE TRIAL COURT ORIGINALLY ASSUMED JURISDICTION OVER THEIR CHILDREN BASED UPON A PREPONDERANCE OF THE EVIDENCE STANDARD AND SUBSEQUENTLY TERMINATED THEIR PARENTAL RIGHTS BASED UPON CLEAR AND CONVINCING EVIDENCE?

2. WHETHER THE BURDEN OF PROOF WAS SHIFTED, VIOLATING PETITIONERS' DUE PROCESS RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT, WHERE THEY WERE REQUIRED TO ACCEPT RESPONSIBILITY FOR THE NON-ACCIDENTAL DEATH OF THEIR CHILD AND THE CHILDREN WERE IN FOSTER CARE FOR MORE THAN TWO YEARS PURSUANT TO CONTINUING COURT ORDERS?

3. WHETHER PETITIONERS' RIGHT TO REMAIN SILENT, GUARANTEED BY THE FIFTH AMENDMENT, WAS VIOLATED WHERE THEY WERE REQUIRED TO ACCEPT RESPONSIBILITY FOR THE NON-ACCIDENTAL DEATH OF THEIR CHILD IN A CIVIL PROCEEDING SEEKING TERMINATION OF THEIR PARENTAL RIGHTS?

4. WHETHER THERE WAS SUFFICIENT EVIDENCE TO TERMINATE PETITIONERS' PARENTAL RIGHTS?

5. WHETHER THE SERVICES PROVIDED TO PETITIONERS BY THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES AND ITS AGENTS WERE SO INADEQUATE AS TO VIOLATE FEDERAL STATUTES AND REGULATIONS APPLICABLE TO FOSTER CARE?

TABLE OF CONTENTS

CHILDREN'S QUESTIONS PRESENTED i

TABLE OF CONTENTS . . . . . ii-iii

TABLE OF AUTHORITIES . . . . . iv - viii

JURISDICTION OF THE COURT 1-2

RESPONDENT CHILDREN'S STATEMENT OF THE CASE 3-17

REASONS WHY THE WRIT SHOULD BE DENIED 18

1. Petitioners' Burden of Proof Argument Was Never Raised In Any Of The Proceedings In The State Court, Nor Was It Addressed By The Michigan Court of Appeals. Further, That Argument Is Without Legal Merit Or Support . . . 18-22

2. There Was No Impermissible Shift Of The Burden Of Proof Where The Trial Court Had Previously Found That The Parents Were Responsible For The Non-Accidental Death Of One Of Their Children, They Were Required To Assume Responsibility For The Death And The Children Were In Foster Care For More Than Two Years Pursuant To Continuing Court Orders . . 22-26

3. Petitioners' Right To Remain Silent Was Not Violated Where They Were Required To Accept Responsibility For The Non-Accidental Death Of Their Child In A Civil Proceeding Seeking Termination Of Parental Rights 26-33

4. Review Of Factual Determinations Of The State Trial And Appellate Courts Is Not A Matter Properly Reviewed By This Court And There Was Sufficient Evidence Presented In The Trial Court To Support Termination Of The Parents Rights 33-34

5. Appropriate Services Were Provided To Petitioners By The Michigan Department Of Social Services And Its Agents And There Was No Violation Of Federal Law, Relating To Foster Care, Which Could Merit Review By This Court . . 34-37

6. Petitioners' Application For The Writ Of Certiorari Should Be Denied Because Further Proceedings In This Case Would Not Be In The Best Interests Of The Children 37-41

CONCLUSION 41

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TABLE OF AUTHORITIES

CASES: PAGE(S):

Baltimore City Department of Social Services v Bouknight, 493 US ____, 107 LEd 2d 992; 110 SCt 900 (1990) 29

Barker v Palmigiano, 425 US 308; 96 SCt 28

Branti v Finkel, 445 US 507 (1980) 1551; 47 LEd 2d 810 (1976) 33

Brown v United States, 356 US 148 (1958). 28

Cardinale v Louisiana, 394 US 437 (1969) . . 1, 2, 19

Dutchess County DSS v Mr. G., 141 Misc 2d 641; 534 NYS 2d 64 (Fam Ct. 1988) . . . 31, 32, 36, 38

Dymenstein v State, 720 P 2d 42 (Alaska App 1986) . 32

Ferguson v Georgia, 365 US 570 (1965) 18, 26

Graver Mfg. Co., v Linde Co., 336 US 271 (1949) . . 33

In re Interest of Brungardt, 211 Neb 519; 319 NW2d 109 (1982) 32

In re Interest of CDC, 455 NW2d 801 (Neb 1990) . . 38

In re Interest of Two Children, 477 So2d 888 (La App 4, Cir 1985) 32

In Interest of K.L.C., 372 NW2d 223 (Iowa 1985) . . 32

In Interest of R.W.B., 241 NW2d 546 (ND 1976) . . . 32

In Interest of T.D.H., 344 NW2d 268 (Iowa 1983) . . 32

In re Interest of V.B., 220 Neb 369; 370 NW2d 119 (1985) 32

In re Futch, 144 Mich App 163 (1983) 24, 29

In re Gentry, 142 Mich App 701 (1985) 26

In re Jessica B., 254 Cal Rptr 883 (Cal App 5 Dist, 1989) 31

In re Juvenile Appeal (84-AB), 192 Conn 254; 471 A2d 1380 (1984) 32

In re Lamkin, 355 US 59 (1957) 18, 26

In re Martin, 167 Mich App 715 (1988) 26

In re Micah S., 198 Cal App 3d 557; 243 Cal Rptr 756 (Cal App 6 Dist 1988) 38, 39

In re Miller, 433 Mich 331 (1989) 23

In re Ryan M., 513 A2d 837 (Me, 1986) 28

In re Schejbal, 131 Mich App 833 (1984) 38

In re Springer, 172 Mich App 466 (1988) 36

In re Stricklin, 148 Mich App 659 (1986). 28

In the Matter of Adrianson, 105 Mich App 300 (1981) 16

In the Matter of Amer, Mich Ct Apps No. 114910 (1990) 18, 26, 33, 35

In the Matter of Tammie Z., 66 NY 2d 1; 484 NE2d 1038 (1985) 21, 22

Layne & Bowler Corp. v Western Well Works, 261 US 387 (1923) 26, 34

Ledbetter v Brown City Bank, 141 Mich App 692 (1985) 18, 26

Lefkowitz v Turley, 414 US 70 (1973) 27, 28

Lehman v Lycoming County Children's Services Agency, 458 US 502 (1982) 34, 35, 38

Long v Long, 255 NW2d 140 (Iowa 1977) 32

Matter of Adoption of Embick, 351 PA Super 491; 506 A2d 455 (1986) 32

Matter of Ferris, 151 Mich App 736 (1986) 16

Matter of Welfare B.C., 356 NW2d 328 (Minn App (1984) 32

Matter of Welfare of J.W. and A.W., 415 NW2d 879 (Minn, 1987) 30

Matter of Welfare of V.H., 412 NW2d 389 (Minn App 1984) 32

Matter of Nathaniel T., 67 NY 2d 838; 492 NE2d 775 (1986) 36

Matthews v Eldridge, 424 US 319 (1976) 20

Michigan v Tyler, 436 US 499; 56 LEd2d 486; 98 SCt 1942 (1978) 1

Moore v Sims, 442 US 415 (1979) 34

NLRB v Hendricks County Rural Electric Corp., 454 US 170 (1981) 33, 35

People v Anderson, 409 Mich 474 (1980); cert den 449 US 1101 29

People v Guy, 121 Mich App 592 (1982) 28

People v Johnson, 382 Mich 632 (1969); cert den 397 US 1079 28

People v Draper, 150 Mich App 481 (1986) 32

Rice v Sioux City Cemetary, 349 US 70 (9155) . 26, 33

Riviera v Minnich, 483 Us 574 (1987) 22

Sanabria v United States, 437 US 54 (1978) 29

Santosky v Kramer, 455 US 745, (1982) . 19, 20, 21, 38

Stanley v Illinois, 405 US 645 (1972) 22

State v Tunnell, 51 Wash App 274, 753 P2d 543 (1988) 32

Sylvander v New England Home for Little Wanderers, 584 F2d 1103 (CA 1, 1978) 39

Texas v Mead, 465 US 1041 (1984) 33

United States v Floyd, 496 F2d 982 (CA 2, 1974) . . 32

United States v Gainey, 380 US 63 (1965) 24

United States v Hall, 792 F2d 941 (CA 9, 1986) . . 32

STATUTES & COURT RULES:

Ark. Stat. Ann. §9-27-325(b)(2) 20

Colo. Rev. Stat. §19-3-505(i) (Supp 1990) 20

D.C. Code Ann. §16-2317(b)(2) 20

Fla. Stat. Ann. §39-408(2)(b) 20

Ky. Revd Stat. Ann. §620.100(3) 20

Maine Revd Stat. Ann., Tif. 22 §4035.2 20

Md. Cts & Jud. Proc. Code §3-819(d)(1989) 20

MCLA 710.56 17

MCLA 712.56(2) 37

MCLA 712A.18(i)(a)-(e) 21

MCLA 712A.19a(a)-(f) 19, 20

MCLA 712A.19b 20

MCLA 712A.19b(3)(b) 26

MCLA 712A.19b(3)(c) 26

MCLA 712A.20 19

MCR 5.903(A)(19) 19, 20

MCR 5.972(C)(1) 19

MCR 5.974 19

MCR 5.974(A) 19

MCR 5.974(A)(2) 19

MCR 5.974(F)(3) 38

Miss Code Ann. §43-231-561(3) (1981) 20

N.H. Rev Stat. 169-c:13 (1990) 20

N.J. Stat. Ann. §9:6-8.46b (Supp 1990) 20

N.Y. Fam Ct Act §1046(b) (1983) 20

Ore Rev Stat. §419.500 (1989) 20

Sup Ct Rule 14.1 (1990 Rev) 26

Sup Ct Rule 14.1(j) (1990 Rev) 33

Sup Ct Rule 14.3 (1990 Rev) 33

Sup Ct Rule 23 (1990 Rev) 38

Texas Fam Code §11.15(a) (Vernon Supp 1989) 20

42 USC 671 et seq 22, 34, 36, 38

42 USC 675 37

42 USC 675(5)(B) 37

42 USC 675(5)(C) 37

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Coleman, Hon. Mary S., et.al; Coleman Commission Report on Permanency Planning, pp. 11, 33 39

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JURISDICTION OF THE COURT

Petitioners assert that this court has jurisdiction pursuant to **28 U.S.C. §1257(a).** However, petitioners have failed to establish that at least two of their questions presented have been properly preserved for review by this court. First, petitioners' question relating to the two different burdens of proof applied at the various stages of the juvenile court proceedings **(Petitioners' Question I, 1)** was never presented by petitioners in the state court, either at the trial court or appellate level. Further the issue was not addressed by the Michigan Court of Appeals in its decision below. **(See Petitioners' Appendix A)** This court will not decide federal constitutional issues raised before for the first time in the review of state court decisions. **Cardinale v Louisiana, 394 US 437; 22 LEd2d 398; 89 SCt. 1162 (1969).** Second, petitioners' Fifth Amendment issue **(Petitioners' Question, I, 2 (sic))** was not properly preserved for review because it was not raised at the trial court level, thus excluding it from review by the state appellate court. **(See, Opinion of Court of Appeals, pp 14-15; Petitioners' Appendix A)** The failure to present such federal issues in compliance with state procedure precludes review of those issues by this court. **Michigan v Tyler, 436 US 499; 56 LEd2d 486; 98 SCt. 1942 (1978)** Petitioners' questions numbered I, 3 and I, 4 are subject to similar jurisdictional defects because they are dramatically different from those presented

to the state appellate court and there is no evidence that they were raised in the trial court. In fact, from the language presented here, one can only speculate as to the relationship these questions have to the issues presented in the state court. This should not be enough to invoke the discretionary jurisdiction of this court. See, **Cardinale** v **Louisiana**, **supra**.

RESPONDENT CHILDREN'S STATEMENT OF THE CASE

This family originally came to the attention of the authorities in March of 1984, when two reports of suspected child abuse **(DSS Form 3200's)** were received by the Wayne County Michigan Department of Social Services **(hereinafter DSS).** These reports related to allegations of injuries suffered by the child, Samier Amer (d.o.b. 11/18/83). On April 2, 1984, a petition was filed with the Wayne County Juvenile Court **(hereinafter "court")**, requesting that the court assume jurisdiction over the child. On September 4, 1984, an adjudicatory hearing was concluded before Referee Gail McKnight. Referee McKnight assumed jurisdiction over the child Samier. In doing so the court found that the child had suffered fractures of the arm, the legs and the collarbone, being five in total. These fractures were of different ages. The testimony also established that tests had been done to rule out bone problems and that there was no medical reason for the child to have a large number of fractures. The fractures were described by one medical witness to be due to child abuse. **(See, Report and Recommendation of Referee 9/4/84, Petitioners' Appendix H.)**

On November 26, 1984, a dispositional hearing was held before Referee McKnight. The child was ordered placed with the maternal grandmother and the parents were ordered to be involved in counselling and parenting classes.

The first statutory review hearing **(pursuant to MCLA 712A.19)**[1] was concluded on October 18, 1985, before Referee Chester Drake (Referee McKnight's successor). Referee Drake ordered that the child be continued as a temporary court ward, and that he be allowed to have an extended visit in the parents' home, with supervision two days a week and individual and family therapy. **(Statutory Report, filed October 25, 1986.)** The child had been allowed to go home, due at least in part, to a recommendation by Dr. Herman Schornstein, who had stated that due to the cooperation and openness shown by the parents the child could be safely returned home despite their failure to get to the roots of the abuse of the child **(T, 411-412).** On November 22, 1985, the child Samier Amer died. On November 22, 1985, a preliminary placement order was entered by the court, ordering that the children, Mohammed Ali Amer and Suehier Amer (Samier's surviving twin) be placed in emergency foster care. On November 25th and December 2, 1985, a preliminary hearing was held before Referee Seymour Weberman. The children were ordered to be placed in emergency foster care and a petition was authorized. A petition was filed on December 5, 1985, requesting that the court take jurisdiction over the children **(T, 1717-1718).**

1This statutory section has since been substantially rewritten. See, MCLA 712A.19; P.A. 1988, No. 224, Sec. 2, Effective April 1, 1989. All proceedings in the instant case were conducted pursuant to the old statute.

On November 23, 1985, Dr. Sawait Kanluen, an Assistant Wayne County Medical Examiner, conducted an autopsy of the deceased child Samier Amer. His opinion was that the child:

> **"...died of blunt injuries to the head causing stellate fracture of the skull over the back of the head (subdural hematoma) and contusions of the brain.**
>
> **There was one impact to the back of the head. The pattern of injuries indicated that the head was moving at a great velocity and struck a fixed object.**
>
> **The manner of death is classified as a homicide."**
>
> **Medical Examiner's Report, 11/23/85.**

The doctor explained his conclusions in his testimony at the adjudicatory hearing on September 10, 1986, before Judge Martin T. Maher:

> **A. In consideration of the injuries, the extent of the injury, it's my opinion that the injury happened when the head moving in great speed, high speed and struck a fixed object. The point of impact was on the back of the head.**
>
> **Q. What medical evidence led you to believe that the head was moving at a great speed and hitting a fixed object?**
>
> **A. Because of the contusion of the brain was on the opposite side of the impact. The impact was on the back of the head and the**

contusion of the brain was in the front part of the brain.

***** *** *** *** *** *** *** *** *****

Q. Doctor, in your expert medical opinion in the area of forensic medicine would shaking the child have caused that stellate fracture along with the contusion on the front of the head?

A. You're talking about shaking baby syndrome. No, shaking baby syndrome is different than this particular case. This particular case is either, you know, someone picked the child up and then swings the child, you know, in a high speed. Or, threw the child on to the floor or whatever in that manner. It's not shaking, no. It's just one throw or one swing like you swing a baseball bat or whatever in that kind of fashion. It's not shaking back and forth.

(Adjudication, 9/10/86, pp 75, 79-80.)

The original petition filed 12/5/86, was amended by a motion of counsel for the children. **(Motion to Amend Petition, filed 3/26/86.)** That motion was granted by the court on May 12, 1986. **(Order 5/13/86.)**

A trial was held on the amended petition before Judge Maher on several dates in September and October of 1986. The hearing had been continued, on agreement of the parties, until after the mother's criminal trial on the charge of Second Degree Murder. The mother was found not guilty. **(Petitioners' Appendix, p 150)** Both parents testified at the

hearings. They denied any knowledge of how their son died. **(Adjudication 200-224; 272-286, 312-357.)** At the close of proofs, the court took jurisdiction over the two children, finding that there was neglect of the children and abuse and depravity in the home. **(See, MCLA 712A.2(b)(1) & (2).)** The court specifically found that the child Samier's death was not accidental. **(Adjudication, October 28, 1986, p. 382.)** The court, in its findings of fact, specifically discounted the testimony of the parents on a number of issues. **(Adjudication, supra, pp 383, 386-387, 389, 390-391.)** The court concluded by saying that:

> **"So, if you take all of the testimony put together and you just use common sense and this is a situation where one of these two people is responsible for the death of that child and the other person is responsible for not protecting that child."**
>
> **(Adjudication, supra at 392; Petitioners' Appendix G.)**

On December 9, 1986, Zinabe Ahmed Amer was born. On December 10, 1986, a preliminary order was entered placing the child in emergency shelter care. On December 12, 1986, a preliminary hearing was held before Referee Frances Pitts, who authorized a petition as to Zinabe and continued the detention of the child **(T, 1721).**

On December 15, 1986, a dispositional hearing was held as to Mohammed Ali and Suehier. **(Pursuant to MCLA 712A.18)** Those children were continued in foster care. The

family was ordered to continue in family therapy and the child Mohammed Ali was to be in individual therapy. As to the child, Zinabe, the parents stipulated to wardship on that child and she was also placed in foster care. **(Order, 3/5/87; Petitioners' Appendix F)** Petitioners never appealed these findings and orders of the court, and they never sought a rehearing. **MCLA 600.861; MCLA 712A.21.**

On March 10, 1987, an order was entered transferring the case to the Presiding Judge's Docket (Judge Y. Gladys Barsamian). A statutory review hearing **(pursuant to MCLA 712A.19, since amended)** was scheduled for 5/7/87. **(Order, March 10, 1987.)**

Extensive testimony was taken at the statutory review hearing heard on May 7, 8, and 29, 1987, before Judge Barsamian.

At the close of the hearing, the judge noted that both the parents and therapists had been proceeding on the case as if the death of Samier were an accident. The judge stated that this was inappropriate because the court had previously found that the child had been killed. The court stated that one of the major impediments to return was the parents' insistence that the death was accidental **(Statutory Review; 5/29/87, 552-562).** The court therefore ordered that the parents be in therapy to deal with the non-accidental death of Samier Amer, that the children be continued in foster care and that visitation between the mother and Mohammed Ali

be suspended. **(Order, June 1, 1987; Petitioners' Appendix pp 151, 157.)**

On December 16, 1987, a petition was filed requesting that the parents' rights to all three children be terminated. **(Petition, 12/16/87)** The petition was filed pursuant to the old **MCLA 712A.19a.** This section has been substantially revised and is codified as **MCLA 712A.19b (effective April 1, 1989).**

The hearing on the permanent custody petition was held on 16 different days from May of 1988 to January, 1989. By agreement of the parties, the court heard the case both as a hearing on the permanent custody petition and on a statutory review hearing. The latter was done at the request of the parents, who argued that the Order of June 1, 1987, should be modified, specifically as to the parents' need to admit responsibility for the non-accidental death of the child Samier, and they asserted that more should be done to attempt to reunite the family **(T, 43-48).**

The petitioners' case, which was generally supported by the counsel for the child, was started at the hearing held on June 16, 1988. The case presented by the petitioners had a number of separate elements, each touched upon by some of the witnesses. Those elements were, first, that reasonable efforts had been made to reunite the family, but that these efforts were unsuccessful. The position of the Department was set out in the testimony of Kimberly Sanford, the petitioner

and foster care worker from DSS. When the children were initially placed in foster care, an agreement had been drawn up and signed by the parents, requiring them to work with the workers on planning for the children, visit the children regularly, be involved in counselling regarding grief over their son's death and for parenting-skills training and be supportive of the foster parent. **(Petitioners' Appendix K, Parent-Agency Agreement, 6/24/86; T, 924-926.)** When the children were made court wards in October, 1986, a new agreement was drawn up, requiring the parents to visit, go to Parent's Anonymous, and be in therapy regarding abuse in their home. The parents would not sign this plan due to the latter requirement **(T, 928-932; Respondent's Exhibit No. 5, Parent-Agency Agreement, January, 1987).**

Despite the parents' refusal to sign the treatment agreement, both sides continued to work on the other elements. The parents were provided with weekly visits with the children, conferences were arranged between the parents and the agency workers, referrals were made for counselling for the parents and to Parents Anonymous. In addition, therapy was provided for the oldest child and the children were placed in specialized foster care to give them extra attention **(T, 932-936).** Finally, efforts were made to arrange cultural and religious training for the children, by attempting to hire a Muslim Imman to work with the children. This plan was canceled by the Imman **(T, 1041-1042).** Ms. Sanford, as well as

the other workers on the case from Judson Center, noted that the parents cooperated with most of what was asked of them **(see Testimony of Elyse Fine, T, 372-473)**, but that the parents' failure to acknowledge responsibility for the abuse suffered by Samier was a continuing impediment to the return of the children. The workers explained that this was an essential first step because it went to why the children were in foster care. Other potential services were conditioned on progress in this area. **(T, 398, 562, 933, 975.)**

The reason why this particular issue was so important was that the history of the case had indicated that other approaches to therapy had not been successful, and in fact the child had been killed after earlier courses of therapy **(T, 411-414)**. Dr. Herman Schornstein testified that the fact that there was severe abuse here, that the severity of the abuse of the child Samier had escalated up to his being killed, and that the parents continued to deny direct responsibility for that abuse was convincing evidence that this was an untreatable family **(T, 441-444)**. A major determinant in whether the parents could achieve any success in treatment was whether the parents directly confronted their responsibility in the killing of the child **(T, 448, 462-463, 666)**. There was no evidence here that the parents had done this **(T, 612, 726)**.

The petitioners' case was also based upon the fact

that the parents, particularly the mother, had certain serious problems which had not been adequately resolved. The mother was described by clinicians from the Clinic for Child Study as having strong feelings of loss and rejection and having a psychological disposition to anxiety. These characteristics would cause serious problems in her interaction with the children, especially the child Mohammed Ali **(T, 599, 647-648, 710, 713-714).** The father was seen as unable or unwilling to recognize any problems that the mother might have and both he and the mother were so wrapped up in their own problems that they would be unable to do what was best for the children **(T, 666, 730-731).** Finally, both Julie Ribando and John Derr from the court's Clinic for Child Study testified that given that the parents had been in therapy for three years relating to the abuse of their children, it was unlikely that significant progress, warranting return of the children, would occur in the near future **(T, 649-660, 666, 730-731).**

Finally, both the petitioner and counsel for the children presented evidence that the child Mohammed Ali had been traumatized by the abuse suffered by his brother Samier. He was frightened of his mother because of what he felt she had done and sad and confused by the father's failure to give him more emotional support **(T, 647, 1202-1204, 1351-1353).** Given the child's own needs, including his progress in working out the death of his brother Samier, return to the parents would be harmful, both due to his experience and the fact that

the parents were not willing to work with him on the issue of the death of his brother **(T, 1324-1325)**.

The parents' case had four elements: First, that they had done all that had been asked of them by the agencies and the court, except expressly admit responsibility for the abuse of the child Samier Amer **(T, 977-981)**. The latter admission was not necessary because the parents had accepted responsibility for what had happened to their son and they had worked on the components of their abusive behavior; e.g., anger, self-esteem, marital stress **(T, 81-83)**.

Second, the parents argued that reasonable efforts had not been done to reunite the family and more could have been done to reunite the family. **(T, 1225-1227, 1250, 1258)**. The parents also proposed that a program of "strategic family therapy" be instituted along with a program of incremental visits **(T, 1530, 1600-1601)**. The parents also presented testimony that the whole family should be evaluated together before any definitive decision could be made **(T, 15365-1538)**.

Third, the parents presented evidence that they were emotionally healthy individuals who could provide a healthy and nurturing environment for their children **(T, 88-90, 1502, 1511)**.

Finally, it was the parents' contention that any emotional problems evidence by the children, in particular Mohammed Ali, were due to the influence of his foster mother,

who had misled him regarding the circumstances of his brother's death and turned him against his parents (T, 1449-1502, 1511).

At the close of proofs, the court made extensive findings of fact and law. The judge first enumerated all the important elements of the almost four-year legal history of the family's involvement with the court (T, 1714-1725). The history of the case was significant to the court because of, first, the circumstances of the initial wardship of the child Samier Amer. Once the child had been placed in foster care, the parents were very cooperative with the workers and the workers on the case. However, the parents failed to acknowledge how the injuries had occurred. Despite this the child had been returned to the parents, precisely because they had been cooperative. It was soon after this that the child was killed while in the care of the parents (T, 1725-1728).

After the adjudication on the surviving children, the parents were again very cooperative in the treatment plan, except again as to acknowledging responsibility for the killing of their child. The court found that this issue was central to a determination in the case. In doing so, it rejected appellant's argument that the parents could "experientially" accept responsibility for the death of the child, because that approach had been tried and had failed (T, 1729-1730). The court noted that until it was known how and why the child had died, there was no assurance that what the

parents were working on in therapy would provide a safe home for the children **(T, 1731).**

The court specifically found that efforts had been made to reunite the family by a number of people, but that all of those efforts had been unsuccessful. The court also found that the problems that existed with the family initially continued to exist three and a half years later and that there was nc likelihood that they would change in the foreseeable future. The court therefore found that there was clear and convincing evidence to terminate the parents' rights, pursuant to **MCLA 712A.19a(e)** and **(f).** The court then found that termination of the parents' rights was also in the best interests of the children, given that their continuation in foster care would be more harmful to them than termination **(T, 1732-1734).** The children were therefore committed to Michigan Children's Institute for adoption planning and the parents' rights were terminated. **(See, Petitioners' Appendix B and C.)**

Petitioners did <u>not</u> file a petition for rehearing after the court's termination order. Pursuant to **MCLA 712A.21** that petition could have challenged **"...all the matters coming within the provisions of this chapter... ."** Presumably including factual issues.

On June 12, 1990, the Michigan Court of Appeals affirmed the decision of the Wayne County Juvenile Court. In their appeal of right to the Court of Appeals, Petitioners never challenged any element of the Juvenile Court's original

assumption of jurisdiction over the children. Such a collateral attack on the original adjudicative hearing is allowed as a matter of case law in Michigan. **Matter of Ferris, 151 Mich App 736 (1986); In the Matter of Adrianson, 105 Mich App 300 (1981).**

In its decision the Court of Appeals discussed, at great length the history and testimony presented in the trial court. The respondent children adopt, by reference the court's recitation of the facts as supplementing the statement of the case herein. In deciding the case the court held that the trial court's decision terminating petitioners' parental rights was supported by clear and convincing evidence and was not clearly erroneous. The court rejected petitioners' due process argument that the burden had been impermissibly shifted and it rejected a due process challenge to the statutory scheme in effect at the time of the trial. The court declined to specifically address petitioners' fifth amendment argument and it held that there was no violation of state and federal law relating to reasonable efforts. The issue of the different standards of proof at the original adjudication and the subsequent permanent termination hearing was not presented by petitioners on appeal and was not addressed by the appellate court. **(See, Petitioners' Appendix A.)**

At the date of this writing, the minor children have been continuously in foster care for four and five years,

respectively. Pursuant to Michigan law, they were legally available for adoption at the point when the state court appeals were exhausted. **See, MCLA 710.56(2).** It is unclear to counsel what legal effect these proceedings may have on the adoption process.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners' Burden Of Proof Argument Was Never Raised In Any Of The Proceedings In The State Court, Nor Was It Addressed By The Michigan Court of Appeals. Further, That Argument Is Without Legal Merit Or Support.

Petitioners' first question presented, relating to an alleged violation of due process resulting from the different burdens of proof at the original adjudication hearing and the permanent termination haring, was never raised by petitioners in the state court trial or on appeal. Nor was the issue addressed by the Michigan Court of Appeals. First, the Michigan appellate court's, as a matter of state procedure, do not generally address issues not properly raised in the trial court. See, **Ledbetter v Brown City Bank, 141 Mich App 692 (1985); In the Matter of Amer, Mich Ct of Apps, Docket No. 114910, Petitioners' Appendix A.** Generally speaking, a petitioner's failure to follow state procedures for raising a federal question will preclude review by this court. See, **Ferguson v Georgia, 365 US 570 (1961); In re Lamkin, 355 US 59 (1957).** Second, the question was never presented to the Michigan appellate courts, nor was it decided on appeal. The decision of the Michigan Court of Appeals accurately catalogues and discusses the issues raised by petitioners in their appeal below. The burden of proof question was not one of them. **(See, Petitioners' Appendix A, pp 12-15.)** This court will not decide federal constitutional questions raised for the first time in this court where it

reviews state court decisions. **Cardinale** v **Louisiana**, **394 US 437 (1969).** Petitioners' first question is therefore not properly justiciable by this court.

Assuming arguendo that this question is properly preserved for argument by this court, the question is not one that merits consideration by this court and petitioner has not demonstrated that any error occurred in the case at bar.

Under Michigan law the standard of proof required at the "trial" or adjudication stage is the preponderance of the evidence standard. **MCR 5.972(c)(1).** The trial is defined in **MCR 5.903(A)(19)** as **"...the fact finding adjudication of a case on a charge contained in an authorized petition to determine if the minor comes within the jurisdiction of the court."** Termination of parental rights can only occur after the court has assumed jurisdiction over a child and where the parents have received proper notice of the request for termination. **MCR 5.974(A).** Termination of parental rights is a dispositional question separate from the court's assumption of jurisdiction. **MCLA 712A.20.** The standard of proof in parental rights termination hearings in Michigan is clear and convincing evidence. **MCR 5.974;** see, **Santosky** v **Kramer**, **455 US 745 (1982).** The issues in the termination hearing is whether a statutory basis for termination has been established and whether that termination is in the best interest of the child. **MCR 5.974(A)(2).** The statutory basis for termination at the time of the proceedings below was set out in **MCLA**

712A.19A(a) - (f). That statute has since been significantly changed by the new **MCLA 712A.19b (Effective 4/1/89.)**

The statutory scheme in Michigan is similar to that in most states. Most states require the moving agency to establish the grounds for jurisdiction by a preponderance of the evidence, and all states mandate clear and convincing evidence for termination of parental rights. See, **e.g., Ark. Stat Ann § 355 (West Supp 1990); Colo Rev Stat § 19-3-505(1) (supp 1990); D.C. Code Ann § 16-2317(b)(2); Fla Stat Ann § 39-408(2)(b); KY Revd Stat Ann § 620.100(3); Maine Revd Stat Ann, Tif. 22 § 4035.2; MD Cts & Jud Proc. Code § 3-819(d) (1989); Miss Code Ann § 43-21-561(3) (1981); N.H. Revd Stat 169-C:13 (1990); N. J. Stat Ann § 9:6-8.46b (supp 1990); N.Y. Fam Ct Act § 1046(b) (1983); Ore Rev Stat § 419.500 (1989); Texas Fam Code § 11.15(a) (Vernon Supp 1989);** see also, **Santosky** v **Kramer, supra.**

The application of the preponderance standard at the original adjudication meets constitutional muster. Applying the due process analysis set out in **Matthews** v **Eldridge, 424 US 319 (1976),** and **Santosky** v **Kramer, supra** one must first look at the private interests affected by the proceeding. At the adjudication the interests of the parent is not nearly as great because the issue is not permanent loss of parental rights, but rather only whether the court will assume jurisdiction over the child. **MCR 5.903(A)(19).** Even if the court does take jurisdiction, the case still may be warned and

dismissed, the child may be placed in the parent's home under court supervision or the child may be temporarily placed in a foster home or an institutional setting.

MCLA 712A.18(i)(a) - (e). Also at stake in such proceedings are the child's independent right to safety and well-being. This interest is comparable to that of the parents. See, **In the Matter of Tammie Z., 66 NY 2d 1; 484 NE2d 1038 (1985); Comment, "Dependency Proceedings: What Standard of Proof"?, 14 San Diego L Rev 1155 (1977).**

Second, and most importantly is that the risk of error can fall more heavily on the child in the adjudicatory stage. While in the termination of parental rights case the likely consequence of an erroneous failure to terminate is the preservation of an uneasy status quo, **Santosky v Kramer, supra at 765-766,** the erroneous denial of jurisdiction could mean that the child would be returned to a neglectful or abusive home. **In the Matter of Tammie Z., supra.** The consequences of returning a child to such a home, especially without any court supervision, could very well be grave and even life-threatening. See, **Comment, "Dependency Proceedings: What Standard of Proof"?, supra at 1168, fn 71-74.** Moreover, the evidentiary problems are particularly great at the adjudicatory stage. Most abuse and neglect by it's very nature occurs in the home, where the parents are presumably in charge. The only witnesses may very often be young children who could be fearful of further maltreatment if they "told" or

migt be too immature to testify. In many ways the parents are in a much more advantageous evidentiary position at the adjudicatory stage than either the state or the children. See, **Comment, What Standard of Proof at Dependency Proceedings?, supra.**

Finally, the government's parens patriae interests includes its interest in protecting the physical safety and well-being of children. See, **Stanley v Illinois, 405 US 645 (1972).** The state also has an interest in assuring that families that evidence problems receive some attention to remedy them in an effort to preserve families. See, **In the Matter of Tammie Z., supra;** see also, **42 USC 671 et seq.** These interests are best served by the preponderance standard. Moreover, the fact that most states apply this standard is strong evidence that the legislative judgment is consistent with the traditions of our people and our law, and that it is entitled to a powerful presumption of validity. **Riviera v Minnich, 483 US 574 (1987).**

The standards of proof applied by the trial court were therefore constitutionally proper and do not merit further review by this court.

2. There Was No Impermissible Shift Of The Burden Of Proof Where The Trial Court Had Previously Found That The Parents Were Responsible For the Non-Accidental Death Of One Of Their Children, They Were Required To Assume Responsibility For the Death And The Children Were In Foster Care For More Than Two Years Pursuant To Continuing Court Orders.

Petitioners' burden shifting argument was effectively answered by the Michigan Court of Appeals in its decision below. See, **Petititioners' Appendix A, p 14.** In its decision the appellate court properly drew a distinction between the burden of proof placed on the party seeking to terminate parental rights and the burden of going forward, which can properly be placed on the parents. Where, as here, the parents produce some evidence that the family situation has improved, they have met their burden of production. The burden of proof remains on the moving party. See, **In re Miller, 433 Mich 331 (1989).** However, simply meeting the burden of production does not mean that the parents should necessarily prevail. **In re Miller, supra at 345.**

Moreover, the trial court did not adhere to any irrebutable presumptions. The first alleged presumption had to do with the legal effect of the death of the child Samier; appellants frame it as the death of the minor child from a head injury, which was not adequately explained by the parents, would establish their unfitness to care for their children. By framing the issue in this way, petitioners misstate the facts here, which were that the death of the child was non-accidental and that one of the parents was responsible for that death. These facts established that the parents abused and neglected their children. **(Adjudication, 10-28-86, 382, 392.)** Such findings can reasonably be

considered to be a determination that the parents home was unfit. See, **In re Futch, 144 Mich App 163 (1983).**

When the case went to hearing on the permanent custody petition, the issue was not whether the death of the child established the parents' continuing lack of fitness, but rather whether the efforts made to rehabilitate the family had been sufficiently successful to render the home safe for the return of the children **(T. 1731-7132).** A distinction must be drawn between the proper presumption of unfitness which was established at the original adjudication and the process of proofs at the permanent custody hearing. The conclusion that the unexplained, non-accidental death of a child in the parents' care shows parental unfitness is quite similar to the presumption that the United States Supreme Court approved in **United States v Gainey, 380 US 63; 13 L Ed 2d 658; 85 SCt 754 (1965).** That statutory presumption met the court's rational connection standard. Similarly, a finding of parental unfitness, in a home where a child is killed, bears a rational connection.

The burden in the instant case was clearly on the State to show that the parents had failed to remedy the problems which caused their children to come into foster care. What appellant has confused here is the behavioral burden on the parents to achieve some meaningful change in their practices and abilities as parents and the State's legal burden of proof that the parents had not changed and that

their problems continued unabated. That burden never shifted here.

Similarly, appellants' second alleged presumption was in fact an issue which was subject to the full proofs presented by the prosecution **(T. 413-414; 424-426; 720-721; 938-939).** The fact that appellants were not able to prevail on this issue at the hearing below does not mean that the court simply presumed that a failure to admit responsibility meant that the parents home was unfit. Instead, the court considered the history of other therapeutic approaches and their failure to protect the children and concluded that the problems which brought the family to the attention of the court had not been resolved **(T. 1729-1732).** Finally, the record refutes any assertion that nothing was done to work with the family until they "confessed to a crime." **(See, Petitioners' Appendix A; Appendix B pp 29-42.)** In fact, at no time were the parents made to "confess to a crime." See, **infra**.

Finally, petitioners' argument no longer has any relevance to the present statutory scheme. The termination of parental rights provisions of the Michigan Juvenile Code were substantially amended in April, 1989. Those changes eliminate any question as to where the burden of proof lies and also make clear that there are no irrebutable presumptions in the

statute.[2] See, MCLA 712A.19b(3)(b) and 19b(3)(c). It is therefore apparent that petitioners' argument is at best an issue important only to the parties and not to the public. As such it is not justiciable by this court. Rice v Sioux City Cemetary, 349 US 70 (1955); Layne J Bowler Court v Western Well Works, 261 US 387 (1923).

3. Petitioners' Right To Remain Silent Was Not Violated Where They Were Required To Accept Responsibility For The Non-Accidental Death Of Their Child In A Civil Proceeding Seeking Termination Of Parental Rights.

Petitioners' fifth amendment argument was not properly raised in the state trial court and is therefore not justiciable by this court because there is a non-federal ground adequate to support it, namely the lack of a timely objection. Ferguson v Georgia, 365 US 570 (1961); In re Lamkin, 355 US 59 (1957); see, Ledbetter v Brown City Bank, 141 Mich App 692 (1985).

Assuming arguendo that the question is justiciable

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Petitioner raises a facial attack on the constitutionality of the old statutory scheme in the body of his argument. However, this issue was not presented in petitioners' Questions Presented for Review and is not properly before this court. See, Sup Ct Rule 14.1 (1990 Revised). Even assuming arguendo that the question is properly presented, it is not an issue meriting consideration by this court because it is a challenge to a statute which is no longer in effect. See, Rice v Sioux City Cemetary, 349 US 70 (1955); Children's Argument, infra. Finally, the Michigan Court of Appeals has properly rejected such constitutional challenges on a number of occasions. See, In re Martin, 167 Mich App 715 (1988); In re Gentry, 142 Mich App 701 (1985); Michigan Court of Appeals Decision, In re Amer, Petitioners' Exhibit A.

by this court, petitioners' contention that their rights against self-incrimination and due process were violated, flies in the face of the factual and legal circumstances of this case. Their rights against self-incrimination were simply not implicated here. What they are essentially left with is an argument that they differ with the trial court's position that an admission of responsibility for the death of their son was an essential treatment goal. This is not an issue that rises to constitutional magnitude, but rather was a proper and well-reasoned exercise of the trial court's discretion.

During the three years that this case was pending before the Juvenile Court, the parents testified voluntarily at every stage. Both parents testified extensively at the adjudicatory hearing in 1986. **(Adjudication, 200-224; 272-284; 295-308; 312-357.)** Both testified in their own behalf at the statutory review hearing held in 1987. **(Statutory Review, 352-365; 401-409.)** Both also testified at the hearings on the permanent custody petition. **(T. 12/14/88, 4-176; 1375-1488.)** At no time during the case in Juvenile Court was either parent compelled by the State to testify.

The self-incrimination privilege of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment...,

> **...not only protects the individual against being involuntarily called as a witness against himself in a**

> **criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. Lefkowitz v Turley, 414 US 70, 77, 94 SCt 316, 322, 38 L Ed 2d 274 (1973).**
>
> **See, In re Stricklin, 148 Mich App 659 (1986).**

However, even in a criminal proceeding, once a defendant testifies, she waives her Fifth Amendment rights. **Brown v United States, 356 US 148 (1958); People v Johnson, 382 Mich 632 (1969); cert den 397 US 1079; People v Guy, 121 Mich App 592 (1982).**

Although the right does apply in civil cases, like that at bar, it is much more limited. Generally, adverse inferences can be drawn against a party who does not testify. **In re Ryan M., 513 A2d 837 (Me, 1986); see, Barker v Palmigiano, 425 US 308; 96 SCt 1551; 47 L Ed 2d 810 (1976).**

Thus petitioners' rights against self-incrimination were not implicated here, both because they were never compelled to testify and their statements could not incriminate them in later criminal proceedings. This was true because, as appellant so aptly argues, the mother had been acquitted of criminal charges, arising out of the death of her son, before the juvenile court case came to adjudication in 1986. Retrial of the mother on charges arising out of that incident was barred by the principles of double jeopardy.

Sanabria v United States, 437 Us 54 (1978); see, People v Anderson, 409 Mich 474 (1980); cert den 449 US 1101.

In fact, the procedures followed here had the result of protecting petitioners' Fifth Amendment rights because all of the proceedings were held after the trial on the criminal charges. **(Petitioners' Appendix B, pp 24-25; Appendix N, p 151.)** This had the effect of providing petitioners with absolute immunity from prosecution. See, **Patton, "The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings", 24 Georgia L Rev 473, 501-502, 516-523 (1990) (hereinafter cited as Patton).** Petitioners' were therefore free from any coercive circumstance which could have implicated their right to remain silent. See, **Baltimore City Department of Social Services v Bouknight, 493 US ____; 107 L Ed 2d 992; 110 SCt 900 (1990).**

Absent any Fifth Amendment privilege, petitioners seem to try to elevate their denial of responsibility to a matter protected by due process. This assertion is made without any authority. See, **In re Futch, 144 Mich App 163 (1984).** Moreover, it challenges, without basis, the trial court's exercise of discretion in supervising the wardship of these children. The juvenile court's decision in May, 1987, to order the parents to deal with and accept responsibility for the non-accidental death of their son was made only after extensive testimony at the May, 1987, statutory review

hearing. That order was never appealed. Moreover, it was a reasonable approach to the case, given the facts before the court. What the parents are actually complaining about to this court is that the juvenile court did not believe their explanations of what happened to their son. But the court was under no obligation to do so. Nor did the court have to agree with the parents that their denial of direct responsibility for the death of their son was not an impediment to effective treatment. The court reasonably found otherwise.

The Minnesota Supreme Court, in the case of **Matter of J.W. and A.W.**, 415 NW 2d 879 (Minn, 1987), discussed the impact of a parent's failure to admit responsibility for abuse of a child in the context of the Fifth Amendment:

> It is equally clear the privilege does not prohibit the state from initiating further measures for the safety and well-being of the children. The parents cannot enjoin the state from seeking court orders keeping the children in foster care, or, if the situation should require, from seeking termination of parental rights. What the parents would like to claim, although of course they cannot, is that their responsibility for the death of a child and the inferences arising therefrom is privileged and may not be considered in determining their suitability as parents. But to state this proposition is to refute it. Not only does the proposition ignore the fact that the evidence of responsibility has already been received but it

ignores the best interests of children.

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The parents, of course, are free to show they have changed their abusive and violent ways and can be good parents, so that the family may be reunited. But, says the trial court, "It is well settled that an explanation and recognition of the cause of the child's death is necessary before any meaningful change can occur to correct the behavior that lead [sic] to the abuse of [the nephew]." The parents may disprove the trial court's assumption, if they can, -- and on this record, it is only an assumption -- but it would seem a difficult task to engage in any effective therapy without confronting honestly one's own inadequacies in discussions with the psychologist. All we can say is that it remains to be seen whether a less than candid therapy will suffice to make appellants good parents. Admittedly, the parents are confronted with a dilemma, but it is not a dilemma that triggers the Fifth Amendment to the extent the parents would wish. In the lexicon of the Fifth Amendment, the risk of losing the children for failure to undergo meaningful therapy is neither a "threat" nor a "penalty" imposed by the state. It is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent.

Supra at 883-884 (footnotes omitted). See, In re Jessica B., 254 Cal Rptr 883 (Cal App 5 Dist, 1989); Dutchess County

DSS v Mr. G., 141 Misc 2d 641;
534 NYS 2d 64 (Fam Ct, 1988)

Moreover, a vast majority of the courts that have been presented with this and similar issues have held that the refusal to admit abuse has been a persuasive factor against the return of children and in favor of termination of parents rights: State v Tunell, 51 Wash. App. 274, 753 P.2d 543 (1988); Dymenstein v State, 720 P.2d 42 (Alaska App. 1986); Matter of Welfare of V.H., 412 N.W.2d 389 (Minn. App. 1987); People v Draper, 150 Mich App 481, 389 N.W.2d 89 (1986); In Interest of K.L.C., 372 N.W.2d 223 (Iowa 1985); In Re Interest of V.B., 220 Neb. 369, 370 N.W.2d 119 (1985); In Interest of Two Children, 477 So.2d 883, 888 (La. App.1 4 Cir. 1985); In re Juvenile Appeal (84-AB), 192 Conn. 254, 471 A.2d 1380 (1984); Matter of Welfare B.C., 356 N.W.2d 328, 331 (Minn. App 1984); In the Interest of TDH, 344 N.W.2d 268, 270 (Iowa 1983); In re Interest of Brungardt, 211 Neb. 519, 319 N.W.2d 109, 115 (1982); Long v Long, 255 N.W.2d 140, 145 (Iowa 1977); In Interest of R.W.B., 241 N.W.2d 546, 557 (N.D. 1976); cf Matter of Adoption of Embick, 351 Pa. Super. 491, 506 A.2d 455, 468-471 (1986).

Similarly, many courts have held that an acknowledgment of guilt is a critical first step towards rehabilitation. United States v Hall, 792 F2d 941 (CA 9, 1986); United States v Floyd, 496 F2d 982 (CA 2, 1974), cert den 419 US 1069 (1974). Petitioners, in contrast, cite no

cases supporting their position. Their argument does not merit review by this court. See, Rice v Sioux City Cemetary, 349 US 701 (1955).

4. Review Of Factual Determinations Of The State Trial And Appellate Courts Is Not A Matter Properly Reviewed By This Court And There Was Sufficient Evidence Presented In The Trial Court To Support Termination Of The Parents Rights.

While petititioners appear to present a challenge to the sufficiency of the evidence presented at trial **(see, Petitioners' Questions Presented I, B)**, this question is not directly addressed in petitioners' arguments for allowance of the writ. This error should preclude review by this court of this question. See, **Sup Ct Rules 14.1(j)** and **14.3.** Even assuming that the issue is properly before the court as a matter of procedure, there is no reason for this court to review the factual determinations of the state courts. See, NLRB v Hendricks County Rural Electric Corp., 454 US 170 (1981); Texas v Mead, 465 US 1041 (1984) (Stevens, J.) This court, as a court of law rather than a court for the correction of errors in fact finding, does not undertake to review concurrent findings of fact by the lower courts in the absence of a very obvious and exceptional demonstration of error. Branti v Finkel, 445 US 507 (1980); Graver Mfg. Co. v Linde Co., 336 US 271 (1949). There was no such error here. See, In the Matter of Amer, Mich Ct Apps Docket No. 114910, Petitioner's Appendix A.

Moreover, there was clear and convincing evidence to support the termination of petitioners' parental rights. The Michigan Court of Appeals, in the state court decision below, discussed the evidence in great detail and found that it properly supported termination of parental rights. Petitioners offer no convincing reason why this decision should be set aside, nor do they offer any reason why this question is a matter of importance to anyone other than the parties. See, **Layne & Bowler Corp. v Western Well Works, supra.**

Finally, this court has properly demonstrated a policy of great restraint against involving itself in cases of child welfare. See, **Lehman v Lycoming County Children's Services Agency, 458 US 502 (1982); Moore v Sims, 442 US 415 (1979).** This policy should rightfully apply to the factual review of permanent termination cases. The writ should not be granted as to this question.

5. Appropriate Services Were Provided To Petitioners By The Michigan Department Of Social Services And Its Agents And There Was No Violation Of Federal Law, Relating To Foster Care, Which Could Merit Review By This Court.

Petitioners' bold assertion that no efforts were made to reunite this family, in violation of the requirements of **42 USC § 671 et seq (Adoption Assistance and Child Welfare Act of 1980)** is without merit or factual support. As with much of petitioners' Petition for Certiorari, this argument asks this court to review factual determinations of the courts

below and to unnecessarily inject itself into state child welfare proceedings. This court has properly chosen to do neither and petitioners offer no reason why they should change those policies. See, **NLRB v Hendricks County Rural Electric Corp., supra; Lehman v Lycoming County Children's Services, supra.**

Second, both the trial court and state appellate court found that reasonable efforts were made to reunite the family. See, **In the Matter of Amer, Mich Ct of Apps, Docket No. 114910, Petitioners' Appendix A; Opinion of Judge Barsamian, 1/9/89, Petitioners' Appendix B.**

Prior to the time that these children were removed from their parents' home, the parents were involved with the Juvenile Court based upon the court's jurisdiction over the child, Samier Amer. The court provided in-home supervision of the instant children, liberal visitation with the child, Samier, referrals for parenting classes and therapy with an ethnically congruent therapist. Despite these services, the child, Samier Amer, was killed while in the care of the parents. **(T. 921)** The Juvenile Court therefore ordered that the surviving children be removed from the parents' home to assure their safety. **(T. 1717)**

During the time that the children were in foster care, the parents were provided with regular weekly visitations with the children, weekly meetings with the social workers, and quarterly conferences with all parties to discuss

progress and problems in the case. The parents were referred to Parents Anonymous and to a therapist for psychological counseling. The children were provided with intensive supervision in the foster home and the oldest child was provided with individual therapy. **T. 933)** These efforts to both prevent removal and reunite the family were both reasonable and appropriate under the circumstances of this case. See, **National Council of Juvenile and Family Court Judges, etal., Making Reasonable Efforts: Steps for Keeping Families Together, pp 66-69, 72-73; 42 USC 671 et seq; Dutchess County DSS v Mr. G., supra; Matter of Nathaniel T., 501 NYS 2d 647; 492 NE 2d 775 (1986).**

It should be emphasized that other efforts to reunite the family were envisioned if and when the parents had accomplished the primary goal of acknowledging responsibility for the death of their son. This was seen as an essential first step by the workers. **(T. 495-496; 562)** The decision to adopt this approach was well within the discretion of the agencies and the court. The fact that the agencies did not adopt the approach advocated by the parents does not mean that reasonable efforts were not made. See, **In re Springer, 172 Mich App 466 (1988); see generally Shotton, A., "Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later, 26 Cal Western L. Rev 223 (1990).**

In addition to providing services to the family, the agencies prepared periodic case plans (called "updated service

plans" here) as required by **42 USC 675. (T. 353-356; 360, 364, 371, 391, 532-544)** In addition, a six-month status review hearing was conducted by the court, as required by **42 USC 675(5)(B)** (the May statutory review) and the bifurcated review/permanent custody hearing met the requirements of **42 USC 675(5)(C).** All the requirements of federal law were therefore met.

6. Petitioners' Application For The Writ Of Certiorari Should Be Denied Because Further Proceedings In This Case Would Not Be In The Best Interests Of The Children.

The minor children Mohammed Amer and Suehier Amer were placed outside of their parents' home on November 22, 1985, pursuant to an emergency placement order. **(T. 1717-1718)** The child, Zinabe Amer, was born on 12/9/86, and was ordered into emergency foster care the next day. **(T. 1721)** All three children have remained in foster care since those dates, periods of more than 5 and 4 years respectively. Pursuant to **MCLA 712:56(2)** the children were legally eligible for adoption on June 12, 1990, when the Michigan Court of Appeals affirmed the decision and order of the Juvenile Court. All three children are now together in a pre-adoptive home, awaiting a finalization of their adoption.

The practical effect of this court granting petitioners' writ of certiorari would be to bring further delay and uncertainty into the lives of these children. Both generally speaking and specifically as to these children, a delay of another 6 to 9 months to allow this court to decide

this case on the merits would not be in their best interests.[3]

In Michigan, as in many other states, the courts are mandated to consider the best interests of the child once grounds for permanent custody have been established. In re Schejbal, 131 Mich App 833 (1984); MCR 5.974(F)(3); also see, In re Micah S., 198 Cal App 3d 557; 243 Cal Rptr 756 (Cal App 6 Dist. 1988), In re Interest of CDC, 455 NW2d 801 (Neb 1990); Dutchess County DSS v Mr. G., 141 Misc.2d 641; 534 NYS 2d 64 (Fam Ct 1988). Similarly, this court has noted that the State's interest in finding a permanent home arises when it is clear that the natural parent cannot or will not provide a suitable home for the child. Santosky v Kramer, 455 US 745 (1982).

The child's need for permanency and the State's interest in finality has been recognized by this court, in Lehman v Lycoming County Children's Services, supra at 513-514 (footnote omitted):

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3 In fact, given that the children could be adopted at any time during the pendency of this case before this court, the questions may very well be moot before this court can decide this case. It must be noted that petitioners have not requested a stay in this case. See, Sup Ct Rule 23 (1990). The court is therefore presented with a situation where it is being asked to intercede in matters normally and reasonably left to the states, (decisions on child custody), in a manner that can only lead to further confusion in this and other cases. This contradicts the intent and substance of prior decisions of this court and federal law. See, Lehman v Lycoming County Children's Services, 458 US 502 (1982); 42 USC 671 et seq.

> **The State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions.**
>
> **See, Sylvander v New England Home For Little Wanderers, 584 F2d 1103 (CA 1, 1978).**

One of the most common impediments to permanency for children is the delay attendant to an appeal, such delays are clearly not in the best interests of the children. **In re Micah S., supra; Coleman, Hon. Mary S., et. al., Coleman Commission Report on Permanency Planning, pp 11, 33.**

In the case of **In re Micah S., supra at 762,** Judge Brauer of the California Court of Appeals discussed the reasoning underlying a best interst analysis (relying on **Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, (The Free Press, 1979):**

The state should not lightly intrude into the relationship between parent and child. But once neglect, abandonment or abuse had dictated removal, the separation of a child from a parent has devastating emotional consequences so as to make imperative an early new bonding with a person or persons who fulfill a child's psychological needs for stability, interaction, companionship, interplay and mutuality. Foster placement, being temporary, does not do the trick because it warns the adults against any deep emotional involvement with the child. Even adoptive parents may hesitate to make a full commitment to the child as long as the placement is not irrevocable. The absence of a psychological parent must reflect the child's, not the adult's, sense of time. Perhaps the most poignant as well as most frequently quoted passage is: "Three months may not be a long time for an adult decisionmaker. For a young child it may be forever." On the basis of their investigations and professional judgment the authors conclude that the "...maximum intervals beyond which it would be unreasonable to presume that a child's residual ties with his absent parents are more significant than those that have developed between him and his longtime caretakers [are]: (a) 12 months for a child up to the age of 3 years at the time of placement; (b) 24 months for a child from the age of 3 years at the time of placement." (footnote omitted)

This case has lingered on for 5 1/2 years, both the state trial court and the appellate court have found that there was sufficient evidence and grounds to terminate petitioners' parental rights. Once that has been established the interests of the children must be considered paramount. Any further delay in this case would not be in the children's best interests. —The writ should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted:

William E. Ladd (P-30671)
Attorney for: Amer Children
JUVENILE DEFENDER OFFICE
2400 Penobscot Building
Detroit, Michigan 48226
(313) 964-0690

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